

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUINN POINDEXTER,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 233907

Wayne Circuit Court

LC No. 00-002284

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to commit great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a habitual offender, third offense, MCL 769.11, to 13-1/2 to 20 years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the late night winter shooting of the victim, Timothy Ruff. The victim testified that he had been out with friends to a liquor store. However, he was by himself near the front of defendant's home when defendant ran out of his house with a big long gun. Defendant fired multiple shots at the victim. The third shot struck the victim in the head. The victim estimated that defendant was ten to fifteen yards away when the shot was fired. The gunshot caused severe injuries. When police officers arrived on the scene, they found the victim seriously wounded in the street alone and conscious. A police officer testified that one eye was destroyed, while the victim's other eye was hanging, displaced from the eye socket. The gunshot also destroyed the victim's face. Because of the loss of blood from the injury, police officers did not wait for an ambulance, but placed the victim in a squad car and rushed him to the hospital. The victim survived, but was blind as a result of the gunshot wound.

Before being rushed to the hospital, the victim was able to identify the street he was on. The victim did not name the shooter, but told police that the shooter lived in the "third house" and pointed toward defendant's home. The victim testified that defendant was the shooter, and he knew defendant from the neighborhood. The victim knew the landlord of the premises leased by defendant. He also identified defendant by his nickname "Big 50." The victim was adamant in his identification of defendant and denied identifying a person named "Red" as the shooter. He explained that he did not identify defendant by his nickname immediately at the scene because he could not see who was assisting him and feared that defendant was present and would

kill him. The victim denied knowing a family in the area named Robinson. The victim denied any wrongdoing that would have caused defendant to shoot him.

Both defendant and Walter Petty, Jr.,¹ were taken into custody regarding an unrelated matter a few weeks after the shooting of the victim. While held at the station, Petty gave a statement implicating defendant in the victim's shooting. Specifically, Petty alleged that defendant came to his residence after the shooting and reported three men trying to break into a car belonging to defendant. Defendant stated that the men fired at him, and he fired back. While two men ran from the scene, defendant observed one man lying on the ground. At trial, the parties stipulated to admission of the medical records. However, defense counsel noted that the treating physician had not responded to phone calls seeking clarification regarding the terms "tattooing amalgam." Defense counsel noted that tattooing was commonly associated with a close range firing, while the victim had testified that defendant was a considerable distance when the shooting occurred. Defense counsel argued that the term "tattooing" evidenced a close range shooting, and the victim was therefore mistaken in his identification of defendant as the shooter. The trial court acquitted defendant of the charged offense, assault with intent to commit murder, MCL 750.83, but convicted defendant of the lesser offense of assault with intent to commit great bodily harm less than murder and felony-firearm.

After defendant filed his claim of appeal, this Court remanded the case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Three days of testimony were heard by the trial court. Defendant's trial counsel testified regarding his decision to call witnesses, his decision to stipulate to the medical records, and his advice to defendant. Defendant presented the alibi testimony of three individuals that resided with defendant. Witnesses, including defendant, testified that defendant was in the residence at the time of the shooting. Additionally, these witnesses either implied or identified Petty² as the shooter. Witnesses also testified that they learned of Petty's statement to police when he appeared at trial.³ Although trial counsel testified that he subpoenaed a married couple named Robinson to testify at trial, the Robinsons testified that they came to court, albeit late, at the request of a woman who lived in the neighborhood. Mrs. Robinson testified that the victim identified "Red" as his shooter. In addition to this testimony, appellate counsel sought to rely on defendant's passage of a lie detector test and the failure to call an expert to explain the contents of the victim's medical records to establish ineffective assistance. The trial court resolved inconsistencies in the testimony against defendant and concluded that the issues raised by defendant were matters of trial strategy.

¹ Both defendant and Petty were acquitted of assaultive charges in 1998. At that time, Petty was represented by defendant's trial counsel in this case. Thus, defendant was aware of trial counsel's prior representation of Petty.

² Although appellate counsel indicated that Petty would recant his trial testimony, Petty chose to testify and waived his right to have counsel present. Petty did not recant his testimony, but rather stated that he was told that he would not have to testify against defendant when he gave his statement to police. Petty was not questioned regarding any involvement in the shooting.

³ However, this testimony was contradicted in the record, and the trial court resolved this credibility issue against defendant.

On appeal, defendant alleges that he was denied the effective assistance of counsel because trial counsel: (1) failed to present a defense;⁴ (2) failed to call credible and available defense witnesses; (3) advised defendant not to testify; (4) failed to disclose his prior representation of a prosecution witness; and (5) failed to call an expert or physician to explain the contents of the victim's medical records. We disagree. Whether the trial court properly applied the law of ineffective assistance of counsel to the facts presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's factual findings are reviewed for clear error. *Id.* In order for a defendant to establish a claim that he was denied his constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303. Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVeern*, 448 Mich 207, 216; 528 NW2d 721 (1995). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant contends that trial counsel was ineffective for failing to call credible defense witnesses, including the residents of defendant's home and his neighbors, the Robinsons. We disagree. Decisions regarding what evidence should be presented and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). An appellate court will not substitute its judgment for that of counsel with regard to matters of trial strategy. *Id.* The failure to call witnesses will only constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have changed the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

The trial court concluded that defense counsel's failure to call the alibi witnesses was a matter of trial strategy. Indeed, the alibi witnesses were residents in defendant's home and had a motive to lie for defendant. Defense counsel noted that the Robinsons were ambivalent in their testimony, and an adjournment was not requested after their late arrival at trial because of the nature of their statements.⁵ Therefore, defense counsel made a strategic decision to focus on

⁴ In both defendant's original brief and his supplemental brief on appeal, defendant's first argument in support of his ineffective assistance of counsel claim is that trial counsel failed to present a defense. Although framed as a separate argument, a review of the substance of the argument reveals that defendant is essentially arguing that the cumulative effect of all of trial counsel's other alleged errors resulted in the omission of presentation of a defense. Thus, because it merely encompasses defendant's other claims of error, each of which will be discussed *infra*, we will not provide a separate discussion of this argument.

⁵ Defense counsel's questioning of the victim indicated that he was aware of the nature of their testimony as he questioned the victim about any relationship with them and an identification of
(continued...)

challenging the credibility of the prosecution's witnesses and the ability of the victim to identify the shooter. We cannot conclude that the trial court's factual findings with regard to this issue were clearly erroneous. *LeBlanc, supra*.

Defendant's next argument is that defense counsel misadvised him not to testify. Defendant stated that he told defense counsel from the outset that he did not shoot the victim and that he wanted and intended to testify at his trial. Defendant testified that defense counsel advised him not to testify, stating that he had everything under control, so there was no need for defendant to take the stand. To the contrary, defense counsel testified that defendant said that he thought someone was "messaging with" his cars that were parked on the street in front of his house, so he fired a shot in that direction. Defense counsel acknowledged that he had advised defendant not to testify, stating that he "didn't think there was anything we would gain by his testimony." Defense counsel further testified that he thought the prosecutor would ask defendant questions on cross-examination that defense counsel did not want to come up in the trial. The trial court resolved this factual dispute in favor of defense counsel and concluded that the matter was one of trial strategy. *Toma, supra*. The fact that defense counsel's trial strategy was ultimately unsuccessful does not render counsel's performance constitutionally defective. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant next contends that defense counsel was ineffective for failing to disclose on the record his prior representation of defendant's friend, Walter Petty, Jr., and failing to inform defendant that Petty had given a statement to the police implicating defendant in the shooting and that Petty was going to testify against defendant. When alleging ineffective assistance of counsel due to a conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

The record reveals that defendant was very much aware of defense counsel's previous representation of Petty, and there is no indication that the prior attorney-client relationship between Petty and defense counsel created an actual conflict of interest that interfered with or adversely affected counsel's representation of defendant in the instant case, or that any prejudice resulted. See *Smith, supra*. In fact, the trial record indicates that counsel performed a thorough and efficient cross-examination of Petty during which counsel attacked Petty's credibility and challenged his motive for implicating defendant. Defendant provides no support for his contention that defense counsel had an obligation to disclose on the record his prior representation of Petty where, as here, there was no actual conflict of interest. In addition, the record from the *Ginther* hearing indicates that defense counsel informed defendant about Petty's statement to police, and what Petty was going to testify to at trial, telling defendant that "[Petty] could hurt you." Thus, defendant has failed to show that defense counsel's representation in this regard fell below an objective standard of reasonableness or that he was prejudiced. *Pickens, supra*.

Defendant next alleges that defense counsel erred by failing to present expert testimony or the testimony of the victim's treating physician to support the defense theory that the use of

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"Red" as the shooter.

the term “tattooing” in the victim’s medical records indicated that the victim was shot from close range. We note that plaintiff failed to produce evidence that any alleged error prejudiced him. That is, there was no evidence submitted at the *Ginther* hearing that the medical records use of the term “tattooing” demonstrated a close range shooting. The medical records, although admitted at trial, were not presented in the appellate record. However, on the record, the parties noted that the term utilized in the medical records was not “tattooing” alone, but rather “tattooing amalgam.” An “amalgam tattoo” has been defined as:

[A] benign discoloration of the mouth membrane resulting from amalgam particles falling into small, open wounds created during dental treatment or by trauma shortly after a dental treatment, when small, fresh amalgam particles still cling to the mucosa. Foreign particles may be large enough to be seen on x-rays and occasionally the tattoo is seen to expand over time as inflammatory cells beneath the membrane try to “clean up” the area. No treatment is needed, but some persons may be intolerant to one or more components of the tattoo, which usually consists of mercury, silver and copper. [http://www.maxillofacialcenter.com/BondBook/mucosa/amaltattoo.html.]

The amalgam tattoo is given its name because its appearance may be similar to that of a decorative tattoo. *Id.* Thus, the clarification of the term “amalgam tattoo” as a discoloration as a result of a dental condition would not have discredited the victim’s testimony regarding the shooting distance. Therefore, the failure to call an expert to clarify this terminology was purposeful trial strategy. *Davis, supra.*

Moreover, as previously noted, at trial, counsel adequately attacked the reliability of the victim’s version of events, including his identification of defendant as the shooter. During cross-examination, defense counsel sought to undermine the victim’s identification of defendant as the perpetrator by eliciting testimony from the victim that he had consumed two forty-ounce bottles of beer prior to being shot. Counsel also challenged the victim’s description of the clothing, height, weight, and hairstyle of the shooter, suggesting that the description more closely matched Petty than defendant. Thus, defense counsel elicited testimony, and presented closing argument, that supported defendant’s position that he was not the shooter, and that the victim’s testimony was unreliable. In light of defense counsel’s thorough cross-examination of the victim, his failure to introduce expert testimony concerning the possibility that the victim was shot from close range did not impact the presentation of the theory of defense.⁶

Lastly, defendant alleges that he is entitled to resentencing because the trial court improperly considered inaccurate information regarding defendant’s juvenile record and did not rely on objective and verifiable reasons to upwardly depart from the guidelines. We disagree. The trial court must respond to allegations regarding inaccuracies in the presentence report and

⁶ Defendant’s contention that a new trial is warranted based on passage of a lie detector test is outside the scope of our order of remand. Furthermore, the information submitted by defense counsel does not conform with the requirements set forth in *People v Barbara*, 400 Mich 352, 412-413; 255 NW2d 171 (1977).

must exercise its discretion in determining whether the allegations are correct. *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990). A court may depart from the appropriate sentence range if it has a substantial and compelling reason for the departure and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003).

We cannot conclude that the trial court's consideration of the juvenile conviction was an abuse of discretion. *Hoyt, supra*. At the first hearing, the juvenile conviction could not be verified through the use of the computer system. Consequently, the probation officer physically went to the juvenile court and confirmed the conviction and incorporated that information into the presentence report.⁷ Furthermore, the factors upon which the trial court relied to upwardly depart are objective and verifiable, and the court did not abuse its discretion by concluding that they provided substantial and compelling reasons to depart from the sentencing guidelines range. *Babcock, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

⁷ There is no legislature requirement that prior convictions must be confirmed by fingerprint analysis, and defendant's contention should be directed toward the Legislature.